Robert W. Quinn, Jr.
Senior Vice President
Federal Regulatory and
Chief Privacy Officer

AT&T Services, Inc.
1120 20th St., NW, Suite 1000
Washington, DC 20036
T: 202 457.3851
F: 202 457.2020

June 6, 2014

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW – Lobby Level
Washington, DC 20554

Re: Protecting and Promoting the Open Internet GN Docket No. 14-28

Dear Ms. Dortch:

I shared the attached with the following employees of the Federal Communications Commission today:

Jonathan Sallet, General Counsel
Gigi B. Sohn, Special Counsel for External Affairs
Ruth Milkman, Chief of Staff to Chairman Tom Wheeler
Daniel Alvarez, Legal Advisor to Chairman Tom Wheeler
Adonis Hoffman, Chief of Staff to Commissioner Mignon Clyburn
Louis Peraertz, Legal Advisor to Commissioner Mignon Clyburn
Rebekah Goodheart, Legal Advisor to Commissioner Mignon Clyburn
Matthew Berry, Chief of Staff to Commissioner Ajit Pai
Nicholas Degani, Legal Advisor to Commissioner Ajit Pai
Brendan Carr, Legal Advisor to Commissioner Ajit Pai
David Goldman, Senior Legal Advisor to Commissioner Jessica Rosenworcel
Priscilla Delgado Argeris, Legal Advisor to Commissioner Jessica Rosenworcel
Clint Odom, Policy Director to Commissioner Jessica Rosenworcel
Courtney Reinhard, Chief of Staff to Commissioner Michael O'Rielly
Amy Bender, Legal Advisor to Commissioner Michael O'Rielly
Erin McGrath, Legal Advisor to Commissioner Michael O'Rielly

Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with your office for inclusion in the public record of the above referenced proceeding. If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

Robert W. Quinn, Jr.

Net Neutrality and Modern Memory
Posted by: Jim Cicconi on June 6, 2014 at 10:15 am

I saw last month's House Commerce hearing with Chairman Wheeler and was struck once again by the animated discussion revolving around "paid prioritization," "fast lanes/slow lanes," and Section 706 authority versus Title II regulation. The debate feels a bit like the movie Groundhog Day… we've all been here before. And just as in 2010, there doesn't seem to be a common understanding of "paid prioritization," the FCC's 706 authority, or the scope of Title II regulation.

So, if you don't mind, I'd like to cut through some of the current debate by starting with the common understandings we all reached in 2010 after years of argument. Let's begin with "paid prioritization." According to Free Press, there were three troubling "discriminatory business models" that could create fast lanes and slow lanes on the Internet:

• "Pay-for-Play" – where an ISP might refuse to carry content unless the content company pays them "additional fees above normal transit costs."
• "Pay-for-Priority" – where edge providers might pay ISPs for prioritizing traffic on the consumer's broadband Internet access service.
• "Vertical Prioritization" – where an ISP might prioritize its own vertical content and services on the user's broadband Internet access service.

In 2010, many of us noted that the net neutrality debate revolved around unlikely hypotheticals, not any actual, pending or contemplated actions. Mind you, not a single ISP then or now has asserted a desire or right to engage in any of these practices to create "fast lanes and slow lanes." AT&T certainly has no plans or intent to change its position on this.

Once we were able to ground the net neutrality debate in facts and a common understanding of the problem we were trying to solve, the result was the 2010 FCC Order, which created rules the Commission asserted would virtually ban such services. AT&T, and nearly every other ISP, supported those rules. In addition, pursuant to a transparency rule — which was affirmed by the Verizon court — every ISP posted on their websites Statements of Broadband Practices demonstrating their compliance with the FCC rules (ours can be found here). Pursuant to the Verizon opinion, the FCC can enforce those statements and require ISPs to perform their network management consistent with them. More recently, as part of pending mergers, Comcast, Time Warner Cable and AT&T reinforced those commitments by promising to continue operating our networks consistent with the 2010 Rules and our current Statements of Broadband Practices, which, again, the FCC can require us to follow.
So, let me re-cap this for everyone. There is no paid prioritization like Free Press identified on the Internet today. No one has any plan or intent to introduce such paid prioritization practices. ISPs have all posted policies that prohibit them. And the FCC can act against anyone who might nonetheless try to do that. In short, the Internet today is totally safe from fast lanes and slow lanes.

How can the FCC assure itself that fast lanes and slow lanes will not be created in the future? I'd highlight again that AT&T and others have incorporated the 2010 rules that barred the practice into fully enforceable Statements of Broadband Practices. That sure seems to be a good start. But it's obviously not enough for some folks.

Some groups have suggested the best path to prevent paid prioritization is Title II. But there's one gigantic problem with this. The plain language of Title II provides no basis to prohibit paid prioritization. Quite the contrary, Title II actually allows and could protect any such practice. By its terms, Section 202(a) of the Communications Act prohibits "unjust or unreasonable discrimination", not "all" discrimination. Eighty years of FCC precedent and case law make clear that so long as a common carrier offers a service to similarly situated buyers on similar rates, terms and conditions, those practices, including a hypothetical "paid prioritization" service, would satisfy Section 202 (a). In fact, the FCC would likely conclude such a practice involved no discrimination whatsoever under Title II. We know, for example, that under Title II a common carrier can provide, among other things, prioritized installation and repair, different quality of service levels, and term and volume discounts. Differentiated terms of service aren't the exception under Title II, they are the norm. That framework, dating back to 1934, sure seems unsuited to protecting the proverbial "guy in the garage" inventing a 21st century service. And at least one group campaigning for Title II regulation today agreed with that conclusion back in 2010. When Chairman Genachowski first considered adopting a non-discrimination rule modeled on Section 202(a), that group said "the standard of 'unjust and unreasonable discrimination' of Section 202(a) of Title II is neither substantively nor procedurally appropriate for Internet access service..." If we could agree on this point in 2010, it's puzzling why we can't agree on it again in 2014.

So, to summarize, Title II would not prohibit the creation of fast lanes and slow lanes on the Internet — that is clear in the plain language of the law, not to mention 80 years of FCC precedent and court decisions. Arguments to the contrary are pure fantasy. At a minimum, Title II supporters have to concede that their argument depends on the bank shot that an appellate court will agree (a) that the FCC can change its mind about how the Internet works after the Supreme Court has validated its prior decision; and (b) the FCC can then ignore the plain language of the statute and 80 years of precedent to determine that the prohibition of "unjust and unreasonable" discrimination actually means it can prohibit any discrimination. And think of all the additional proceedings that will be needed to unpack where we draw the lines between information services "haves" and telecommunications services "have nots." If that is the road we choose to travel, the investment uncertainty alone will have a massive negative impact on American broadband deployment for years to come.

There's another important argument against Title II — invoking it would risk massive collateral damage to many, if not most, U.S. Internet companies. Title II could turn every edge or content company into a common carrier for at least part, if not all, of their services. In the original Internet classification litigation, the Brand X case, the

Supreme Court in 2005 affirmed the FCC's decision to lightly regulate Internet access service by looking at the entirety of the service being sold, concluding that if the service involved computer processing – as all Internet services do – then Title II regulation should not apply. Proponents of Title II regulation, however, point to Justice Scalia's dissent in Brand X to argue that the majority got it wrong. Scalia stated that "[w]hen cable company-assembled information enters the cable for delivery to the subscriber, the information service is already complete… All that remains is for the information in its final, unaltered form to be delivered via telecommunications to the subscriber." Rather than look at the entirety of the service being offered, Scalia would conclude that every service sold over the Internet– be it access or content – has a Title II transmission component. The implications of that rationale for every Internet company are enormous. It would capture movies purchased from Google Play or iTunes, videos downloaded from YouTube, and OTT subscription services like Netflix and HBO Go. It could also implicate advertising served over the Internet — if those companies are providing, at least in part, a Title II transmission service, contribution to USF is mandatory for the revenue associated with the Title II service. That means allocating revenues between the telecommunications service and the information service, filings justifying those allocations, Form 499s…. you get the drift. Innovators would be paralyzed before they even get off the ground.

And this only scratches the surface of potential harm. Hundreds of other questions would face Internet companies under Title II, scenarios discussed in a recent article by former Clinton Administration official Robert E. Litan of Brookings. Turning up or shutting down services would require FCC permission. State PUCs would also have a fulsome regulatory role over the Internet. Pricing regulation, which is inherent throughout Title II, could intrude into all types of Internet services. Wireless location data would likely be considered CPNI, which means it could no longer be shared with Internet companies for mapping, advertising and other purposes. And once data like IP addresses, URL destinations, browser settings, and location are considered part of a Title II service, FCC privacy rules would surely follow.

More important, Title II regulation would strangle broadband investment just as it did investment in wireline telephony. And it would embolden those overseas who are looking for any excuse to regulate the Internet, and to hobble American companies that dominate Internet commerce globally.

Alternatively, we think Chairman Wheeler has it right.

Section 706, as interpreted by the court and explained by Chairman Wheeler, does provide a path. It's a path AT&T supports. For one, it has already been blessed as a valid source of jurisdiction to address the kinds of concerns articulated by Chairman Wheeler and others throughout the current debate. In upholding Section 706 authority, the Verizon court gave the FCC wide latitude to prohibit conduct that would deter broadband investment. And the approach that Chairman Wheeler has proposed would clearly prevent practices like paid prioritization that we feel would change the fundamental nature of the Internet.

Consumers, edge providers — all of us — want the Internet to remain as it is today — an engine of economic growth, individual empowerment, and infinite possibilities. Our company, AT&T, supported the 2010 rules that preserved those principles. I testified, in a pretty tough hearing, in support of those rules. That's still our position. We oppose the concept of fast lanes and slow lanes on the Internet. Our goal — and the reason we've invested $100 billion over the last five years — is to ensure everyone using the Internet is in the fast lane.

Even after the court's decision in Verizon, we pledged to abide by the 2010 rules. The Open Internet principles on our website haven't been changed. We know they bind us to the pre-Verizon standard. They stand there as a public pledge that we won't engage in the practices some fear. And that we're firmly on the side of the proverbial "guy in the garage", building a new idea that could change the world. After all, we were founded by a guy like that (though maybe it wasn't a garage since cars weren't around yet). But the bottom line is the same. We invented lasers, TV, semi-conductors, and the Big Bang theory. We're with the innovators. We're with those who see the Internet as a liberating technology. We're with those who want to challenge the status quo, and those who simply want to entertain. And, importantly, we're with those who use the Internet to bring the accumulated knowledge of mankind to every single person on the planet. We're determined to keep expanding the opportunities the Internet creates. Count on it. So, let's resolve this debate wisely and with goodwill, preserve what we all value, and move on to the next cool thing. Like what's coming from the guy in that garage next door.

http://www.attpublicpolicy.com/fcc/net-neutrality-and-modern-memory/